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IN THE SUPREME COURT
OF THE UNITED STATES

October Term 1980

No.

AIR LINE PILOTS ASSOCIATION, INTERNATIONAL,
Petitioner

v.

HAROLD E. BAGNALL, et al.,
Respondents

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH JUDICIAL CIRCUIT

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December 2, 1980

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Petitioner, Air Line Pilots Association ("ALPA" or "Association"), respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fourth Circuit entered in this proceeding on June 30, 1980.

OPINION BELOW

The Opinion of the Court of Appeals is reported at 627 F.2d 336. The transcript of the oral opinion of the United States District Court for the Eastern District of Virginia appears in the Appendix hereto.

JURISDICTION

The judgment of the Court of Appeals was entered on June 30, 1980. A timely petition for rehearing en banc was denied on September 3, 1980, and this petition was filed within 90 days of that date. This Court's jurisdiction is invoked pursuant to 28 U.S.C. §1254(1).

QUESTIONS PRESENTED

1. Whether a union's good faith opposition to dissident employees' interpretation of a collective bargaining agreement in a suit for declaratory judgment constitutes a breach of the duty of fair representation.

2. Whether a discharged employee's normal obligation to attempt to exhaust contract grievance remedies, as required by Republic Steel Corp. v. Maddox, 379 U.S. 650 (1965), may be excused in situations where, if the employee fails to persuade the arbitrator, his discharge might be upheld.

STATUTORY PROVISIONS INVOLVED

Title 45, United States Code, §§152 Second, Sixth, Eleventh (a) and (b); 153 First (i), (q), (x); Second; 157 First; 159 First, Second, and Third; 181; 184.

The Statutory Provisions are printed in the Appendix.

STATEMENT OF THE CASE

Petitioner is a labor union and is the exclusive bargaining representative, pursuant to §1, Sixth, of the Railway Labor Act, 45 U.S.C. §151, Sixth, of airline pilots employed by, inter alia, Trans World Airlines, Inc., Northwest Airlines, Inc., and Braniff International Corp. (hereinafter, collectively, "the carriers"). Successive collective bargaining agreements between petitioner and the carriers required each employed pilot either to be or become an ALPA member or to pay ". . . a service charge . . .". ". . . [F]or the first month and for each month thereafter the service charge shall be in an amount equal to the Association's regular and usual monthly dues uniformly required of members of the Association." (A. 3, 8, App. 22. See also Id., 18, 35.)[1/] The agreements provided that ALPA would notify pilots who become delinquent that they may be discharged. If the delinquency is not cured within fifteen days, the Association may request the carrier to discharge the pilot. (Id.) When the

1/ "A." refers to the Appendix to this petition. "App." refers to the Joint Appendix filed in the Court of Appeals.

carrier notifies the Association and the pilot of its decision, either may appeal it to a "neutral referee" named by the National Mediation Board. (Id.) The referee may consider any claim that the agreement has not been "properly interpreted or applied . . ." His decision ". . . shall be final and binding on all parties to the dispute," but until the referee rules, the pilot may not be discharged. (Id., A. 10, App. 23-24. See also Id., 19, 35).[2/]

Respondents are fifteen non-member pilots employed by the carriers. None had become delinquent in his service fees or been threatened with discharge. But respondents brought suit in the United States District Court for the Eastern District of Virginia against ALPA and the carriers, seeking a declaratory judgment that the service charge was illegal under the Railway Labor Act because the amount was based on a percentage of earnings.[3/]

2/ The expenses of the proceeding are borne by the carrier and the Association. (App. 19, 23, 24, 35).

3/ Respondents alleged that the District Court had jurisdiction over their claims pursuant to 28 U.S.C. §1337 and the Railway Labor Act, 45 U.S.C. §151 et seq. The remaining respondents are listed in the caption of the opinion below printed at A-1.

Respondents further alleged that the imposition of a finance charge, provided for in ALPA's Constitution and By-Laws where a member elects to pay his dues in installments, both violated the statute and was not authorized by the contracts between ALPA and the carriers.

The finance charge reflects ALPA's dues structure. Members must pay dues on January 1 at a rate of 1.35% of their annual airline income for the incoming calendar year. (A. 3). ALPA's By-Laws provide that a pilot may (1) pay in advance a lump sum based upon his expected income, subject to adjustment during or at the end of the year (A. 3; App. 54-55); or (2) authorize his employer to check off 1.35% of his income in monthly installments and remit the payments to ALPA (A. 3); or (3) pay his dues under the ALPA finance plan. Under that plan, ALPA bills the pilot for the lump sum in monthly installments, subject to adjustment based on actual earnings, and imposes a 1% finance charge on the unpaid balance. 4/ (A. 3, 17).

4/ Prior to 1970, ALPA had arranged for bank financing of the annual payment. Under that arrangement, members borrowed the lump sum payment from a bank and repaid the debt in monthly installments plus a finance charge. In 1970, ALPA amended its Constitution to provide that it would substitute for the bank, using ALPA's own computers. The finance charge, now paid to ALPA, and the dues rate were not changed. (A. 4, 8; App. 60-71).

Each of these alternatives is available to members and non-members without distinction.

The district court granted summary judgment in favor of petitioner. (A. 23). It dismissed, for failure to state a claim, respondents' statutory and contractual contentions concerning the optional finance charge.

The court of appeals affirmed the district court's decision that a service charge based on earnings did not violate Railway Labor Act, Section 2, Eleventh, 45 U.S.C. §152, Eleventh and declined to decide whether the imposition of an optional finance charge did. But the appellate court held that ALPA had violated its duty of fair representation by requesting respondents to pay the finance charge (A. 11). Although the bargaining agreements require non-members to pay a monthly amount "equal to" the monthly amount regularly paid by members as dues, the Court construed that obligation narrowly:

> "The collective bargaining agreements did not provide for payment of an amount equal to the amount a union member pays and paid by the method he pays . . . [Hence, the] union is entitled to its monthly stipend, to be sure, but no more. Nothing in the collective bargaining agreement gives the union the right to regulate a non-member's method of payment." (A. 9).

Having declared its view of the contract, the Court of Appeals concluded that respondents were being

"overcharged" (A. 14) and on that basis found a violation of the duty of fair representation, and instructed the district court to enjoin the union's collection of finance charges from non-members (A. 14).

The court rejected ALPA's contention that the court lacked jurisdiction to interpret the collective agreements and grant relief for the hypothetical contract breach. ALPA argued that because it had not decided to ask, let alone asked, the employers to discharge respondents, they had suffered no injury and were thus not entitled to relief. In addition, ALPA argued, since plaintiffs had made no effort to invoke the special contractual grievance procedure established to adjudicate controversies over dues delinquencies, they had not exhausted available remedies and the court could therefore not grant them one. No effort to exhaust the contract remedy was necessary to confer jurisdiction upon the court to decide the contract issue, it held, because if an arbitrator upheld the finance charge, the

employee could be discharged.[5/] Hence, the proffered remedy was ". . . no remedy at all . . ." (A. 10).

Judge Winter dissented from the finance charge ruling. He noted that ALPA's Constitution and By-Laws were incorporated by reference into the collective agreements' requirement that non-members pay a service charge equal to a member's regular monthly dues. The majority conceded as much, he pointed out, because the formula for computing dues (which the majority upheld) is contained in ALPA's Constitution and By-Laws, but not in the collective agreement (A. 16-17 & n.2). The contractual requirement that non-members pay a service charge equal to the dues paid by members ". . . make[s], in effect, ALPA's Constitution and By-Laws with respect to the amount of dues and how the amount is affected by the time and manner of payment applicable to non-members." (Id.) Judge Winter then went on to hold that the finance charge does not

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5/ The court did not explain and the record does not show why an arbitrator would be powerless to allow an employee to pay the finance charge and avert discharge if circumstances warranted. Nor does the record show that if an employee proffered payment under protest upon receipt of the carrier's notice, he could not appeal the carrier's decision to arbitration. Indeed, the court seemed to think that threat of discharge would suffice. (See A. 10 & n. 5).

violate the Act because it is optional and, given the deferral of receipt of the lump sum obligation and the cost of administering the financing plan, reasonable as well. (A. 17-18). Judge Winter found it unnecessary to reach the exhaustion point in light of his view of the merits (A. 18).

REASONS FOR GRANTING THE WRIT

1. The Decision Below Conflicts With Established Precedents In This Court And Should be Summarily Reversed.

The decision below conflicts with this Court's decisions authoritatively defining the content of the duty of fair representation. The majority below disagreed with ALPA's interpretation of its contracts. But the court did not, nor could it on the facts here, find "arbitrary or bad faith conduct on the part of the union," Vaca v. Sipes, 386 U.S. 171, 193 (1967), or "substantial evidence of fraud, deceitful action or dishonest conduct," Humphrey v. Moore, 375 U.S. 335, 348 (1964), in ALPA's dealings with the airlines on behalf of respondents. Nor did the court find ". . . hostile discrimination against . . . [a minority]." Steele v. Louisville & N.R. Co., 323 U.S. 192, 203 (1944). See Id. at 204. Yet without such findings, a conclusion that a union has

breached its duty of fair representation cannot stand, as the cited cases show.[6/] We believe, for the reasons persuasively set out by Judge Winter, that the majority's contract interpretation is "glaringly inconsistent" with its own findings. But that aside, a union breaches no representational duty when it merely urges an incorrect contract interpretation. This Court so held in Motor Coach Employees v. Lockridge, 403 U.S. 274 (1971), on facts remarkably similar to those here. There, an employee discharged at a union's behest for failure to pay union dues on time argued that the union had misinterpreted the union security clause in procuring his discharge and thus breached its duty fairly to represent him. This Court rejected that contention, admonishing that ". . . the very distinction, embedded within the instant lawsuit itself, between honest, mistaken conduct, on the one hand, and deliberate and severely hostile and irrational treatment, on the other, needs strictly to be maintained." 403 U.S. at 301. The court below flouted that directive. Its decision thus squarely conflicts

6/ Accord, Ford Motor Co. v. Huffman, 345 U.S. 330, 337-338 (1953); Motor Coach Employees v. Lockridge, 403 U.S. 274, 299-301 (1971); Hines v. Anchor Motor Freight, Inc., 424 U.S. 554, 564 (1976).

with Lockridge, supra, and the numerous other decisions of this Court cited above that authoritatively define the content of the duty of fair representation.

The decision below also grievously misconstrues this Court's authoritative teachings governing the scope of the duty of fair representation. That duty first emerged in Steele v. Louisville & N.R. Co., 323 U.S. 192 (1944). There, black plaintiffs alleged that the union certified to represent their craft under the Railway Labor Act refused to admit blacks to membership and had entered into an agreement with a railroad that in effect, though not in terms, would eliminate their job rights. This Court pointed out that Section 2 of the Railway Labor Act, requiring carriers to bargain exclusively with the certified representative of all members of the craft, stripped employees of the right to select a minority representative or to bargain individually about terms and conditions of employment. 323 U.S. at 200-201. Such a state of affairs would raise constitutional questions, the Court ruled, unless the exclusive representative owed non-members a duty of fairness in exercising the power conferred upon it.

This Court then promulgated a rule of law establish-

ing the duty of fair representation:

> It is a principle of general application that the exercise of a granted power to act in behalf of others involves the assumption toward them of a duty to exercise the power in their interest and behalf, and that such a grant of power will not be deemed to dispense with all duty toward those for whom it is exercised unless so expressed.
>
> * * *
>
> Congress has seen fit to clothe the bargaining representative with powers comparable to those possessed by a legislative body both to create and restrict the rights of those whom it represents, cf. J.I. Case Co. v. National Labor Relations Board, supra, 321 U.S. 335, 64 S.Ct. 579, but it has also imposed on the representative a corresponding duty. We hold that the language of the Act to which we have referred, read in the light of the purposes of the Act, expresses the aim of Congress to impose on the bargaining representative of a craft or class of employees the duty to exercise fairly the power conferred upon it in behalf of all those for whom it acts, without hostile discrimination against them.

323 U.S. at 202-203 (emphasis added). Thus, the duty attaches to the exercise of the statutory right to bargain (i.e., to make agreements and process contract grievances) with the employer. See Steele, supra, 323 U.S. at 200-201, 202; Ford Motor Co. v. Huffman, 345 U.S. U.S. 330 (1953); Humphrey v. Moore, 375 U.S. 335, 342 (1964); Hines v. Anchor Motor Freight, Inc., 424 U.S. 554, 564-65 (1976). Neither this Court nor any other, so far as we are aware, has held that the scope of the

duty extends beyond the performance of a union's statutory representation functions. The sine qua non of a breach of duty is the exercise of the union's statutory authority exclusively to deal with the employer on behalf of the complaining employee or employees.

In its haste to assert jurisdiction over the contract interpretation dispute between ALPA and the plaintiffs, the court below overlooked the absence of any facts indicating that ALPA had exercised its statutory bargaining power adversely to plaintiffs. Thus, the court found no vice in the negotiation or execution of the union security clause with the employer.[7/] And the record shows that ALPA did not deal with the employers with respect to respondents' claim that they could not be discharged for failure to pay the finance charge. (See. p. 4, supra). So far as appears, ALPA's only conduct with respect to the matter in suit was to take a position adverse to respondents in this litigation. That, we submit, did not constitute representation of respondents in the statutory

7/ The court declined to decide whether an express provision requiring payment of a finance charge when an employee opted to pay in installments would be unlawful. See p. 5, supra. Judge Winter's dissent amply demonstrates that it would not have been.

sense. See authorities cited supra, p.10; Freeman v. O'Neal Steel, Inc., 609 F.2d 1123, 1127 (5th Cir. 1980). Thus, the alleged vice in petitioner's conduct did not relate to an exercise of its statutory power to deal with employers on behalf of their employees. The court below erred - and erred fundamentally - in finding a breach of the union's correlative duty.

Since the error in the decision below is plain, and the content of the duty of fair representation settled by numerous authoritative decisions of this Court, it should grant the writ and reverse summarily on the authority of the fair representation cases cited supra, pp. 9-12 , and Motor Coach Employees v. Lockridge, supra. See, e.g., District Lodge 34, IAM v. Cavett Co., 355 U.S. 39 (1957); Mason v. City of Biloxi, 385 U.S. 370 (1966).

2. The Decision Below Marks a Significant And Unwarranted Departure From Prior Precedent Holding That Unless Employees Attempt To Exhaust Available Contract Remedies, The Courts May Not Grant Them Relief From Alleged Breaches Of A Labor Agreement

Settled law requires the courts to refrain from entertaining employee suits involving bargaining contract disputes where the employee has failed to ". . . attempt use of the contract grievance procedure agreed

upon by the employer and union as the mode of redress." Republic Steel Corp. v. Maddox, 379 U.S. 650, 652 (1965). The obligation to exhaust contractual remedies bears special force with respect to parties covered by Railway Labor Act, because Congress has taken pains to limit strictly the role of the federal judiciary in Railway Labor Act disputes, and to discourage the courts from implying new causes of action. General Committee v. M-K-T Railroad Co., 320 U.S. 323 (1943); Switchmen's Union v. National Mediation Board, 320 U.S. 297 (1943); Slocum v. Delaware, Lackawanna & Western R. Co., 339 U.S. 239 (1950). In this case, however, the court excused the employees from the obligation to attempt exhaustion because it concluded that the employees would be required to put their jobs at risk in order to invoke the contract remedy and, if they lost the arbitration, would not be permitted to pay the delinquency and regain their employment.

Even if these conclusions were supported by the record, they purport to establish a broad new exception to the exhaustion doctrine which conflicts in principle with controlling decisions of this Court and the courts of appeals. See, e.g., Machinists v. Central Airlines, 372

U.S. 682 (1963), where employees, discharged for refusing to obey their employer's order, were required to test the propriety of that discharge and the underlying order in the established grievance procedure. Accord, Republic Steel, supra; Andrews v. Louisville & N.R. Co., 406 U.S. 320 (1972); Union Pacific R. Co. v. Sheehan, 439 U.S. 89 (1978); Order of Conductors v. Pitney, 326 U.S. 561 (1946); Slocum v. Delaware, L. & W.R. Co., 339 U.S. 239, 244 (1950); De La Rosa Sanchez v. Eastern Airlines, Inc., 574 F.2d 29 (1st Cir. 1978); Goclowski v. Penn Central Transp. Co., 571 F.2d 747, 755 (3rd Cir. 1977); Haney v. C. & O. Ry. Co., 498 F.2d 987 (D.C. Cir. 1974) (Leventhal, J.); Brown v. American Airlines, —— F.2d ——, 101 LRRM 2113 (5th Cir. 1979); Chesapeake & O. Ry. Co. v. Ford, 590 F.2d 557 (4th Cir. 1979); Krieter v. Lufthansa German Airlines, Inc., 558 F.2d 966 (9th Cir. 1977).[8/] But cf. Richins v. Southern Pacific Company,

8/ In Andrews, supra, this Court pointed out that the exhaustion requirement ". . . stems from the [Railway Labor] Act itself . . . ." which makes administrative resolution of contract disputes "compulsory." 406 U.S. at 323. Under the National Labor Relations Act, exhaustion is required by "federal labor policy," although the creation of contract tribunals is consensual. Republic Steel Corp. v. Maddox, supra, 379 U.S. at 652; Steelworkers Trilogy, 363 U.S. 564 (1960); Id. at 569, 570 (Brennan, J., concurring). Since this case arises under the Railway Labor Act, the conflict between the decision

620 F.2d 761 (10th Cir. 1980), petition for certiorari pending, No. 80-315.[9/]

The lower court's departure from prior, controlling precedent is not authorized by the line of authorities permitting employees to bypass contract tribunals where the record shows that resort to those tribunals would be

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8/ (cont'd)
below and the cited cases is indefensible.

Under the Railway Labor Act, of course, the parties are free to substitute a single arbitrator for System Adjustment Board resolution of contract disputes. If they do, the exhaustion requirement applies with equal force. Krieter v. Lufthansa German Airlines, Inc., 558 F.2d 966 (9th Cir. 1977). That substitution occurred here.

9/ The Brotherhood of Railway Carmen has also sought certiorari from the cited case. Its petition presents the question whether federal courts have jurisdiction over fair representation suits, despite the employees' failure to exhaust Railway Labor Act procedures, where the employees attack the union's failure to grieve on their behalf. If the Court disagrees with our view that the fair representation breach finding below is patently erroneous, then the Court should grant certiorari here to review the conflict between the decision below and Richins, supra, on the one hand and Goclowski, supra, on the other.

"futile." E.g., Glover v. St. Louis-S.F.Ry. Co., 393 U.S. 324 (1969); Jones v. TWA, Inc., 495 F.2d 790 (2d Cir. 1974), explained in Mills v. LIRR, 515 F.2d 181, 183, n. 4 (5th Cir. 1975). Futility may not be presumed, it must be proved. Wells v. Southern Airways, 616 F.2d 107 (5th Cir. 1980), cert. denied, — U.S. —, 105 LRRM 2657 (1980); Haney, supra; Stumo v. United Air Lines, Inc., 382 F.2d 780, 787 (7th Cir. 1967); Arnold v. United Air Lines, Inc., 296 F.2d 191 (7th Cir. 1961).

The record here contains no evidence of futility or predictable unfairness. On the contrary, the contracting parties here deliberately created a special forum, for the resolution of disputes over interpretation of the union security provisions, in which the employee and the union would stand on an equal footing before a detached and neutral arbitrator.[10/]

10/ Accordingly, Glover v. St. Louis-San Francisco Ry. Co., 393 U.S. 324 (1969) and Brady v. Trans World Airlines, 401 F.2d 87 (3rd Cir. 1968) are both inapplicable here. There, the employees were required by contract to submit their disputes for resolution to a tribunal chosen by the very union with whom they were at issue, in circumstances warranting an inference of prejudgment.

The conflict between the decision below and prior precedent is important. As this Court is fully aware, collective agreements regularly provide for the discharge of an employee who shirks his financial obligations to a union that bargains for him. See, e.g., Abood v. Detroit Board of Ed., 431 U.S. 209 (1977); NLRB v. General Motors Corp., 373 U.S. 734 (1963). Unions and employers, moreover, frequently agree upon discharge as a sanction for a wide range of infractions of employee obligations. See, e.g., Magnavox Co., AAA Case No. 111-8 (1967), discussed in FAIRWEATHER, PRACTICE AND PROCEDURE IN LABOR ARBITRATION 288 (1973) (participating in a wildcar strike); Walt Disney World Co., 62 Lab. Arb. 789 (1974) (Semble); Bassick Co., 38 Lab. Arb. 278 (1962); U.S. Corrugated Fibre Box Co., 41 Lab. Arb. 804 (1963); Midland-Ross Corp., 68 Lab. Arb. 1010 (1977) (refusal to accept work assignment); FAIRWEATHER, op cit., supra, 288 n. 43 (collecting cases). Indeed, ". . . it is a principle of industrial relations law that an employee who believes an order to be improper and/or in violation of the Agreement is to obey the supervisor's order first and grieve later, unless such order may be considered to place in jeopardy the employee's safety or health."

Crane Co., 67 Lab. Arb. 820, 824 (1976) (refusal of work assignment). Accord, Dayton Tire & Rubber Co., 67 Lab. Arb. 78, 80 (1976); Feller, A General Theory of the Collective Bargaining Agreement, 61 Calif. L. Rev., 663, 738, 778 (1973).[11] Compelling recalcitrant employees to put their employment at risk in arbitration is therefore a routine and inherent consequence of the exhaustion doctrine and not, as the court below supposed, a novel or punitive device warranting judicial intervention. Hence, if allowed to stand, the invitation issued by the court below to bypass contract tribunals whenever the tribunal is presumed "powerless" to remedy the discharge could readily open the federal courts to a wide range of contract grievance litigation and disrupt the painstakingly created system of labor contract administration established by the parties, Congress, and the courts.[12]

11/ Here, of course, the employer "order" is requested by the union. But that neither makes the employer order less binding nor justifies the departure from principle announced by the court below, especially since the contract expressly provides that discharge will be stayed pending arbitration.

12/ The breadth of that intrusion is highlighted by the ease with which the court below assumed, without support in the record, that respondents would be unable to test their theory of the contract without losing their job. See note 5, supra.

Court intrusion into contract grievance resolution cannot be justified on the assumption indulged in below -- namely, that an impartial arbitration is "tantamount to no remedy at all" because, if the employee loses at arbitration, he also loses his job. As this Court explained recently in Andrews, supra, if the entitlement to continued employment depends on interpretation of the collective bargaining agreement, the courts may not intervene, but must acknowledge the compulsory character of the contractual remedy. Indeed, Congress itself has made provision for arbitration of a discharge grievance mandatory under the Railway Labor Act, Walker v. Southern Railway Co., 385 U.S. 196, 198 (1966), and has prohibited railroad and airline unions from striking over such disputes as a consequence. Brotherhood of Railroad Trainmen v. Chicago River & Indiana Railroad Co., 353 U.S. 30 (1957). In short, if the employee is contractually entitled to a fair and impartial review of his discharge, federal labor policy compels him to pursue that review despite the risks of losing. Hines v. Anchor Motor Freight, 424 U.S. 554, 571 (1976).

In addition, if followed, the rule announced below would usurp the function of specialized labor tribunals.

Recognizing the superior expertise of those tribunals, and their critical role in the collective bargaining process, this Court has steadfastly refused to permit the lower courts to interfere with those tribunals, even to prevent industrial strife. See Buffalo Forge Co. v. United Steelworkers of America, 428 U.S. 397, 411-413 (1976); United Steelworkers of America v. Warrior & Gulf Navigation Co., 363 U.S. 574, 577-583 (1960). Whether the union's position reflects its view of the best interest of the majority, cf., NLRB v. Allis-Chalmers Mfg. Co., 388 U.S. 175, 180 (1967), or of the bargain it struck with the employer, authorizing employees who prefer a contract interpretation different from their representative's initially to resolve the dispute in a suit against the union and the employer "deprived [the contracting parties] . . . of the arbitrator's judgment, when it was his judgment and all that it connotes that was bargained for." Steelworkers v. American Mfg. Co., 363 U.S. 564, 568 (1960). "It is incredible to believe that the courts would always view the facts and the contract as the arbitrator would; and it is difficult to believe that the arbitrator would not be heavily influenced or wholly pre-empted by judicial views of the facts and the meanings

of contracts if this procedure is to be permitted." Buffalo Forge, supra, 428 U.S. at 412. Furthermore, the rule announced below invites conflicting interpretations of nationwide agreements. Cf. Local 174, Teamsters v. Lucas Flour Co., 369 U.S. 95, 102 (1962) since, as the record here illustrates, unions frequently negotiate national agreements with different employers containing identical language. In sum, as this Court said in Republic Steel Corp. v. Maddox, supra, 379 U.S. at 653:

> [A rule permitting] . . . an individual employee to completely sidestep available grievance procedures in favor of a lawsuit has little to commend it.
>
> [I]t would deprive employer and union of the ability to establish a uniform and exclusive method of orderly settlement of grievances. If a grievance procedure cannot be made exclusive, it loses much of its desirability as a method of settlement. A rule creating such a situation "would inevitably exert a disruptive influence upon both the negotiation and administration of collective agreements."

Since the lower court's decision conflicts with decisions of this Court and the courts of appeals, and since the reason advanced for allowing court intervention in advance of arbitration here is wrong as a matter of analysis and policy, this Court should grant certiorari to resolve the conflict and to prevent the rule from being followed elsewhere.

CONCLUSION

For the reasons advanced above, petitioner respectfully requests that this Court issue a writ of certiorari and summarily reverse the decision below, or, in the alternative, review that decision.

Respectfully submitted,

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APPENDIX

APPENDIX

OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 78-1773

HAROLD E. BAGNALL, DONALD BAUER, KRAIG A. HILBINK, ROY A. C. HILL, R. T. KIRCHOFF, THOMAS D. KLEMENS, DAVID LeBOUTILLIER, R. D. LONGWISH, ROBERT G. MAIERS, WILLIAM W. NEINDORFF, N. J. VASILAROS, RICHARD L. BERRY, ALLAN G. SAWATSKY, CLYDE B. SMITH,

Appellants

v.

AIR LINE PILOTS ASSOCIATION, INT'L, TRANS WORLD AIRLINES, INC., NORTHWEST AIRLINES, INC., BRANIFF INTERNATIONAL CORP.,

Appellees.

Appeal from the United States District Court for the Eastern District of Virginia, at Alexandria. Albert V. Bryan, Jr., District Judge

---

Argued June 7, 1979 Decided June 30, 1980

Before HAYNSWORTH, Chief Judge, and WINTER and WIDENER, Circuit Judges.

David T. Bryant (Rex H. Reed, National Right to Work Legal Defense Foundation, on brief) for Appellants; Gary Green for Appellees.

WIDENER, Circuit Judge:

Plaintiffs in these consolidated actions are fifteen airlines pilots who sued their respective employers and the Air Line Pilots Association (ALPA), their exclusive bargaining representative, to obtain a declaratory judgment, an injunction and monetary relief based upon their contentions (a) that they are illegally being required to pay membership dues to ALPA based upon a percentage of their earnings, (b) that ALPA illegally exacts a finance charge from all members of the bargaining unit who elect not to pay membership dues annually in advance or monthly by means of an automatic payroll deduction, and (c) that ALPA, over plaintiffs' objection, has spent a part of the membership dues it has collected for purposes other than the costs of collective bargaining, contract administration, and grievance processing, and plaintiffs are 1/ entitled to recover this portion of what they have paid. The district court granted summary judgment for defendants. We affirm in part and reverse in part.

I.

The facts may be briefly stated: Plaintiffs are variously employees of Trans World Airlines (TWA), Northwest Airlines (Northwest), and Braniff International Corporation (Braniff). Plaintiffs are not members of ALPA.

ALPA has negotiated successive collective bargaining agreements with TWA, Northwest and Braniff, governing the wages, hours and working conditions of pilots employed by them irrespective of whether the pilots are members of ALPA or not. The current agreements require all pilots to become and remain members of ALPA, or, in lieu thereof, to pay an agency shop service charge equivalent to the dues normally required of members.

ALPA's constitution and by-laws provide that annual dues are due and payable by January 1 of each year. They

1/ Since the decision in the district court, the parties have settled this aspect of plaintiffs' suit, and thus it is moot. We do not consider it on appeal.

are fixed at the rate of 1.35% of each covered employee's estimated airline income for the calendar year. If there is a variance between estimated and actual income, ALPA's treasurer makes an appropriate adjustment. Dues may be paid also by a monthly check-off through a member's employer where his employment agreement permits a check-off,[2] or they may be paid monthly directly to ALPA under ALPA's finance plans.[3] The latter option is a recent innovation. Prior to 1970, some members borrowed from a commercial bank to pay their annual dues on January 1 and repaid their bank loan, with a finance charge, over the course of the year. ALPA guaranteed such loans so that the bank gave a favorable interest rate. In 1970, after ALPA had acquired a computer and developed an appropriate internal billing system, it concluded to eliminate outside lenders and to handle the financing and collection of dues itself. It therefore created the option and fixed the finance charge at 1% per month on the unpaid balance.

II.

Plaintiffs' contention that they are illegally being required to pay membership dues to ALPA based upon a percentage of their earnings is grounded on §2, Eleventh, of the Railway Labor Act, 45 U.S.C. §152, Eleventh as made applicable to airline pilots by 45 U.S.C. §181. Section 152, Eleventh (a), permits an employer and a union to make closed-shop agreements with the limitation that:

2/ All three employment agreements involved in this case contain check-off provisions which are available, but are not mandatory, to both members and non-members of ALPA. The employment agreements in these cases do not permit the dues or service charge to be paid in a lump sum, annually, in advance. Neither do they forbid it. The subject is simply not mentioned. The record does not reflect whether ALPA would accept a lump sum payment if one were tendered.

3/ None of the employment agreements involved here contain any provision for the payment of dues through this finance plan. Indeed, they mention no method of payment except payroll check-off which is optional with each pilot.

> [N]o such agreement shall require such condition of employment [i.e., membership in the union] . . . with respect to employees to whom membership was denied or terminated for any reason other than the failure of the employee to tender the periodic dues, initiation fees, and assessments (not including fines and penalties) uniformly required as a condition of acquiring or retaining membership. (Emphasis added.)

The language of §152, Eleventh (a), is similar to §8(a)(3) of the National Labor Relations Act, 29 U.S.C. §158(a)(3).[4/] The purpose of enacting §152, Eleventh, was to require non-union members who benefit from the collective bargaining conducted by the union to share equally with members the responsibilities incident to membership, i.e., to share equally in the expense of operating the union. See generally Legislative History of the Railway Labor Act, As Amended, 93d Cong. 2d Sess., 1970, pp. 1129, 1166, 1249-50, 1269.

Plaintiffs assert that membership dues based upon a percentage of earnings lack uniformity, and hence the requirement of "uniformity" contained in §152, Eleventh (a) is not satisfied. To illustrate their argument, plaintiffs posit that a pilot earning $20,000 per year whose dues or agency shop service charge is computed at 1.35% of his earnings pays less than a pilot earning $35,000 per year whose dues or equivalent is computed at the same rate. Therefore, they assert, a disproportionate share of the costs of operating the union is placed upon the latter, all in violation of the language and purpose of the statute.

4/ Section 158(a)(3) makes it an unfair labor practice for an employer to discriminate against an employee with respect to hire, tenure or any term or condition of employment to encourage membership in a labor organization. The section permits an employer to enter into a closed-shop agreement but specifies that an employer may not discriminate against an employee for non-membership in a labor organization:

> (B) if he has reasonable grounds for believing that membership was denied or terminated for reasons other than the failure of the employee to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership . . . (emphasis added).

We do not agree. First, we note that the statute prescribes "uniformity" and not "equality." In essence, plaintiffs are arguing that the cost of operating the Union must be borne equally on a per capita basis. But this is not the law. In dealing with §8(a)(3) of the National Labor Relations Act, which also prescribes the test of uniformity, the National Labor Relations Board has said:

> [A] labor organization . . . may lawfully charge, as a condition of acquiring or retaining membership, different rates for initiation fees and dues provided that they are based on a reasonable general classification; that is, one that is not discriminatory. Thus, dues based on the employees' earnings have been held to be not discriminatory.

Aluminum Workers Trade Council, 185 NLRB, 69, 70 (1970) (citing Stage Employees & Motion Picture Operators Union, 140 NLRB 759 (1963)).

The assessment of dues based upon a percentage of earnings is, we think, a reasonable classification. Considering either his economic ability to pay or the benefits he realizes from effective representation, a pilot earning greater income has an advantage over a pilot earning less; there are reasons why he should or could pay more. There is uniformity in the basis of computing dues and there is lack of any indication of discrimination. Even if it is true, as plaintiffs suggest but do not prove, that non-members of ALPA earn more than members, there is no claim that ALPA adopted the percentage formula for discriminatory purposes.

Our view that dues based upon a percentage of earnings comports with the language and intent of §152, Eleventh (a), is confirmed by Schwartz v. Associated Musicians of Greater N.Y., Local 802, 340 F.2d 228 (2d Cir. 1964). That case arose under the Labor Management Relations Act and the Labor Management Reporting and Disclosure Act, and it concerned a union's "local tax" of 1-1/2% upon sidemen on all engagements. The question was whether the tax was membership dues within the meaning of the Labor Management Relations Act and its provisions restricting payments to employee representatives. In answering affirmatively the court said:

> [W]e can discern no practical or logical reason for holding that "membership dues" do not embrace the percentage levy exacted by the Local. The tax was similar to membership dues in that it applied equally to all members of the Union who secured employment as sidemen. The fact that payment was contingent upon employment did not mean that the tax was an irregular assessment that could not qualify as dues . . . . 340 F.2d at 234.

Thus, impliedly, the assessment of dues by a formula fixing the amount at a percentage of earnings was approved.

The authorities cited by plaintiffs do not persuade us to a contrary view. The decisions of the National Labor Relations Board on which plaintiffs rely all involved discrimination or lack of uniformity quite different from the disparity in the amount of dues paid by employees in the instant case as a result of the application of a uniform percentage factor. In short, these cases involved general classifications that were not reasonable. For example, in Electric Auto-Lite Co., 92 NLRB 1073 (1950), enforced, 196 F.2d 500 (6th Cir. 1952), the amount of dues payable was dependent upon whether a member attended union meetings. See also NLRB v. Leece-Neville Co., 330 F.2d (6th Cir. 1964). Ferro Stamping & Mfg. Co., 93 NLRB 1459 (1951); Local 153, Int'l Union, 99 NLRB 1430 (1952); and Brewery Workers, Local 102, 116 NLRB 178 (1956), all concerned questions of whether it was discriminatory to charge old employees a higher initiation fee than new employees, or whether a first-time applicant for union membership can be charged a lesser amount than that charged a former member for reinstatement. A holding that some of these forms of discrimination were illegal provides no guidance for proper resolution of the issue that the instant case presents.

Similarly, we do not think that the holding in International Association of Machinists v. Street, 367 U.S. 740 (1961), and its progeny barring the union's use of an employee's funds to support political causes which the employee opposes is of aid here now that that aspect of the instant case has been settled by partial refunds of dues by ALPA to plaintiffs. More significantly, Street held that while an employee may be entitled to an

injunction against future like conduct and restitution of that portion of his funds which were illegally spent, the employee is not altogether relieved of his obligation to pay union dues. 367 U.S. at 771.

III.

Under 45 U.S.C. §152, Eleventh (a), any dues assessed not only must be "uniform" but also must be "periodic" and exclude "fines and penalties." Plaintiffs contend that the 1% charge levied on the unpaid balance of the monthly dues of those employees who choose to participate in the ALPA finance plan constitutes a penalty which is neither uniform nor periodic.

We do not directly consider whether this finance charge is authorized under the Act because the collective bargaining agreements in question do not authorize, and certainly do not require, the payment of dues through the ALPA finance plan.

A review of the collective bargaining agreements in question shows that all three authorize the payment of a service charge by non-members equal to the regular monthly dues. The collective bargaining agreement between ALPA and Braniff provides that each working pilot who does not voluntarily join the union must pay the ALPA a monthly service charge. That service charge "for the first month shall be an amount equal to the Association's regular and usual initiation fees and monthly dues, and for each month thereafter in an amount equal to the regular and usual monthly dues . . . ." The TWA agreement provides that non-member pilots shall pay a service charge which "for the first month and for each month thereafter shall be in an amount equal to the Association's regular and usual monthly dues uniformly required for the members of the Association. Except as provided in Section 3C [checkoff], payment shall be made on the fifteenth day of the month for which such service charge is payable. . . ." The Northwest agreement likewise provides for the payment of a service charge by non-member pilots. There, such a service charge shall be "a monthly amount equal to the Association's regular and usual monthly dues which would be required to be paid by such employees if a member, . . . "

None of these agreements, however, contain a provision for the ALPA finance plan. That plan is established by the ALPA Constitution and Bylaws. There, the ALPA establishes the three methods of payment - monthly checkoff, annual payment in advance, and monthly payment to the association under its finance plan. Thus, ALPA has established a three option payment plan for those bound by its constitution and bylaws.

The plaintiffs are not members of the ALPA and therefore are not bound by the terms of its constitution and bylaws. While non-member pilots are bound to the terms and provisions of collective bargaining agreements, even though they do not belong to the union that negotiated the agreement, the union, however, cannot go a step further and bind those non-members to the union's own constitution and bylaws, not set out in the collective bargaining agreement. None of the collective bargaining agreements themselves authorize the exaction of annual dues, with an imposition of an interest charge if paid on a monthly basis. Therefore, such collection of annual, as opposed to monthly, dues from non-members of the union is unauthorized by these contracts.

These plaintiffs chose not to be members of the ALPA, and therefore should not be bound by its internal constitution and bylaws. We decline to read the terms of the ALPA's constitution and bylaws into the words "service charge" of the collective bargaining agreements. The collective bargaining agreements did not provide for payment of an amount equal to the amount a union member pays and paid by the method he pays. Rather, they provide for the payment of a "service charge" "in an amount equal to the regular and usual monthly dues." So long as the non-member pilot pays to the union the monthly requirement, whether by way of payroll check-off or otherwise, it is a matter of indifference how he comes by the money or the method of payment. The union is entitled to its monthly stipend, to be sure, but no more. Nothing in the collective bargaining agreement gives the union the right to regulate a non-member's method of payment. The non-member may not be required by the union to utilize the ALPA finance plan, thus the union may exact no penalty of non-members on this account nor collect a finance charge of them by compulsion. Accordingly, the only

obligation of the non-member being to pay, the requirements of 45 U.S.C. §152, Eleventh (a), are met in that the "periodic" monthly payments of a service charge equal to the dues of a member do not include "fines" or "penalties" for the union may not exact a finance charge under the terms of the collective bargaining agreement.

IV.

We find no merit in ALPA's contention that plaintiffs have failed to exhaust their contractual or statutory remedies before litigating the validity of the charges in question.

Under the collective bargaining agreements in question, a pilot who has been discharged or threatened with discharge because of a delinquency in the payment of dues or service charges may request review of that decision.5/ Such review could ultimately entitle the pilot to a hearing before a neutral arbitrator chosen by the National Mediation Board. The decision of the arbitrator would be final and binding on all parties. During the pendency of a decision, discharge could not be completed.

We believe that such a remedy is tantamount to no remedy at all. The record does not show any contractual obligation in the collective bargaining agreements or otherwise to arbitrate any question as to the amount of dues other than incident to discharge. A pilot's only recourse in challenging the amount of dues owed would be to stop paying his dues until the Association requested that he be discharged or until he is discharged. At that point he could seek review under his collective bargaining agreement. If, however, he was not successful there, he would be discharged from employment. He would not have an opportunity to repay his delinquent dues which he had to incur in order to start the arbitration process in the first place. We do not consider such an

5/ No arbitration procedure can be initiated before either a threat of discharge or discharge itself has occurred. Both the Northwest agreement and the Braniff agreement provide such procedure for employees who are discharged because of delinquency in payment of dues. Under the TWA agreement, the procedure is available to those employees whose discharge has been requested by the union.

alternative an effective remedy that would bar consideration of plaintiffs' claims. In all events, there is no obligation to arbitrate unless provided by contract. Atkinson v. Sinclair Refining Co., 370 U.S. 238 (1962), overruled on other grounds.

Defendants also assert that the plaintiffs are not entitled to relief because they have not brought their complaint to the Adjustment Board pursuant to the Railway Labor Act. It is well settled, however, that the Adjustment Board does not have jurisdiction to arbitrate disputes between an employee and his union representative.[6/] The language of §3, 45 U.S.C. §153, is subject to no other interpretation. 7/ It is likewise clear that federal courts have jurisdiction to decide disputes between employees and their union representatives where the union has been charged with violating its duty of fair representation. 8/ Such is the case here. The only remaining question is whether the fact that the employer airlines are also defendants in this suit would deprive this court of jurisdiction to decide the issues here. We do not think so.

In Conley v. Gibson, 355 U.S. 41 (1957), the Supreme Court held that the federal courts were the proper forum for employee suits against their union for violation of its duty of fair representation. There, the employer railroad was not a party. The Court reasoned, however, that if it became necessary, the railroad could be joined as a party. 355 U.S. at 45.

6/ Czorsek v. O'Mara, 397 U.S. 25 (1970); Conley v. Gibson, 355 U.S. 41 (1957); Runbaugh v. Winifrede Railroad Co., 331 F.2d 530 (4th Cir. 1964); Jones v. Trans World Airlines, 495 F.2d 790 (2d Cir. 1974).

7/ 45 U.S.C.A. §153 First (i) states that the Adjustment Board has jurisdiction over "[t]he disputes between an employee or group of employees and a carrier or carriers growing out of grievances or out of interpretation or application of agreements concerning rates of pay, rules or working conditions, . . ."

8/ Steele v. Louisville & Nashville Railroad Co., 323 U.S. 192 (1944); Czorsek v. O'Mara, 397 U.S. 25 (1970); Conley v. Gibson, 355 U.S. 41 (1957).

The Court concluded in Glover v. St. Louis-San Francisco Railway Co., 393 U.S. 324 (1968), that federal courts have jurisdiction over disputes that are essentially between employees and their union. There, a group of 13 employees had sued their union representatives and the carrier, alleging claims of racial discrimination. Once again, the Court noted that the railroad adjustment board has exclusive jurisdiction to interpret the meaning of the terms of collective bargaining agreements. 9/ But the Court further held that, while §3 First (i), 45 U.S.C. §153 First (i), by its own terms applies only to disputes between an employee or group of employees and their employer, federal courts do not lose their jurisdiction simply because the employer carrier is included in the lawsuit if the dispute is essentially one between employees on the one hand and the union and the employer together on the other.

In Czorsek v. O'Mara, 397 U.S. 25, 28 (1970), the Court again reaffirmed the holdings of Conley and Glover, noting that such a civil suit is "not within the jurisdiction of the National Railroad Adjustment Board or subject to the ordinary rule that administrative remedies should be exhausted before resort to the courts."

This circuit has dealt with this question in Rumbaugh v. Winifrede Railroad Co., 331 F.2d 530 (4th Cir. 1964). There, the plaintiff employee sued the railroad and his union representative alleging that the union had discriminated against him by refusing him membership, by failing to protect his employment rights and by having him wrongfully discharged. This court, adhering to the position of the Supreme Court in Conley restated that "the Adjustment Board does not have exclusive, or even concurrent, jurisdiction over suits by an employee against the bargaining agent to redress discriminatory treatment." Id. at 536. Quoting with approval Cunningham v. Erie Railroad, 266 F.2d 411, 416 (2d Cir. 1959), the court further stated:

9/ See Andrews v. Louisville & Nashville Railroad Co., 406 U.S. 320 (1972).

> "If the District Court has jurisdiction to proceed against the union it is clear, we think, that it has also power to adjudicate the claim against the railroad. It would be absurd to require this closely integrated dispute to be cut up into segments." 331 F.2d at 537.

Concluding that the controversy was primarily between the union and the employee and that the railroad was at best only incidentally a party to the action, the court ruled that jurisdiction did rest with the federal courts.

In Rumbaugh, defendant railroad also claimed that jurisdiction did not exist because interpretation of the collective bargaining agreement would likely be necessary for full resolution of the controversy. The court rejected that argument and further noted that the court was obligated to interpret the agreement. Without a federal forum to turn to, those plaintiffs would have had no other place to seek any sort of relief.

Citing Rumbaugh, in a case much like this one, concerning union dues, the Third Circuit held, in Brady v. Trans World Airlines, 401 F.2d 87 (3rd Cir. 1968), that it had jurisdiction to consider plaintiff employee's suit against the union and the airline employer, even after the plaintiff had sought and was denied relief by the Adjustment Board. The employee there sued for violation of the union's duty of fair representation and violation of §2, Eleventh, of the Act by his discharge from employment. A dispute had developed as to the exact amount of union dues plaintiff was required to pay, with the union contending that it had raised the dues while plaintiff claimed that the union did not follow correct procedure necessary to raise the amount. Plaintiff was eventually discharged by TWA at the union's request. In deciding the jurisdiction question, the court concluded:

> That the employer was joined to afford complete relief and that the dispute may incidentally involve construction or interpretation of the collective bargaining agreement does not change the basic fact that the Railway Labor Act does not authorize adjustment boards to hear an employee's dispute against his union.

Id. at 93.

Here, the plaintiffs allege that ALPA has a duty to represent fairly both members and non-members within the bargaining unit. As non-members, they charge that they are being overcharged for dues and thus treated discriminatorily. Further, they claim that the amount of service charge and finance charge collected by the union from non-members violate §2, Eleventh, of the Act, 45 U.S.C. §152, Eleventh. We think jurisdiction over these claims has been properly alleged under 28 U.S.C. §1337. We reject defendants' claim that these plaintiffs must exhaust their administrative remedies under the Act before bringing action in federal court.

Accordingly, we affirm that part of the judgment of the district court which approves the setting of a service charge (equal to union dues) as a percentage (1.35%) of pay. We reverse that part of the judgment of the district court which permits the union to require that non-members of the union pay their service charge (equal to dues) only by one of the same methods union members have subjected themselves to by their constitution and bylaws. On remand, the district court will enter its order enjoining the union from requiring the collection of the service charge from non-members by any particular methods, specifically including, but not exclusively, the ALPA finance plan.

Each side in this appeal will bear its own costs.

AFFIRMED IN PART,
REVERSED IN PART,
AND REMANDED.*

*The suits were dismissed against the carriers, and they seem to have been forgotten in the appeal by all sides. The real dispute, of course, is between the plaintiffs and the union.

WINTER, Circuit Judge, concurring and dissenting:

For the reasons that it assigns, I agree with the majority that §2, Eleventh, of the Railway Labor Act, 45 U.S.C. §152, Eleventh, as made applicable to airline pilots by 45 U.S.C. §181, does not render illegal the assessment of membership dues to ALPA by a formula based upon a percentage of their earnings. I disagree, however, that the 1% monthly finance charge levied on the unpaid balance of the monthly dues of those employees who choose to participate in the ALPA finance plan is not to be paid by non-members of ALPA who are covered by the several bargaining agreements. To that extent I respectfully dissent. Further, I do not think that the finance charge runs afoul of the statute because it constitutes a penalty. Certainly also, the finance charge is "periodic" and "uniform", as the statute requires. 1/ Under my view of the case, I would not reach any question of the failure to exhaust contractual or statutory remedies.

The collective bargaining agreements all require the payment of a service charge by non-members of ALPA equal to the regular monthly dues. It is true, as the majority asserts, that the collective bargaining agreements do not authorize the exaction of annual dues with an imposition of an interest charge if paid on a monthly basis. But, the collective bargaining agreements by requiring a service charge equal to the regular monthly dues make, in effect, ALPA's constitution and bylaws with respect to the amount of dues and how the amount is affected by the time and manner of payment applicable to non-members.2/ In short, there is incorporation by reference.

1/ Consistent with the holding in Part II of the majority's opinion, it is obvious that the finance charge is "uniform". It is certainly "periodic" also because it is payable monthly on the unpaid balance of the annual dues.
2/ The majority implicitly concedes as much in Part II of its opinion because the formula for computing dues is contained in ALPA's constitution and bylaws and not in the collective bargaining agreements. I respectfully suggest a glaring inconsistency on the part of the majority when it looks to ALPA's internal documents to find out the amount of the service charge but turns a blind eye to the

Although ALPA's constitution and bylaws provide that annual dues and the equivalent agency shop service charge are payable annually in advance, there are two optional methods of payment: (1) the check-off where no interest is charged or finance charge imposed, 3/and (2) the ALPA finance plan where interest of 1% per month on the unpaid balance is charged. It must be stressed that these two options are precisely that -- options. No pilot is required to employ either, although there may be a strong economic compulsion to authorize a check-off. The lack of compulsion to use the ALPA finance plan where the finance charge is imposed robs the imposition of the charge of a large measure of the nature of a penalty. Simply stated, a penalty is usually suffered involuntarily, as a result of a default by the person upon whom the penalty is imposed; here, the alleged penalty is an obligation voluntarily assumed by the pilot electing this form of payment.

There are other factors which persuade me that the finance charge is not a penalty. When ALPA permits a pilot to defer payment of his annual dues or service charge, ALPA is deprived of the current use of the monies due it, and it is not unreasonable that it should be compensated for the use of its money so long as the rate of compensation is not disproportionate to that prevailing in the marketplace. I do not think that the current finance charge is disproportionate to the current market rate. Additionally, when it defers the payment of dues and there is no check-off, ALPA has other expenses such as billing and record keeping as amounts are paid, and it is not unreasonable that it make a charge to compensate itself for these operational costs. Of course, some of the same operational costs, including the use of its month, are sustained by ALPA when it permits a pilot to use a check-off without imposing a finance charge. But, when a pilot authorizes a check-off, it is obvious that ALPA's

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2/(cont'd)
documents with reference to the amount as affected by the time and manner of payment.

3/ As the majority points out in n. 2 of its opinion, the check-off may be authorized by non-members of ALPA as well as members.

credit risk is markedly reduced. ALPA can look to the credit of the employer rather than that of the employee to insure future payment. It is assured that as a pilot earns compensation the proper percentage will be paid to ALPA. With this reduction of risk, I do not think it unreasonable for ALPA to fail to impose a finance charge on this kind of deferred payment. Certainly the fact that ALPA draws a distinction between the two options and requires a finance charge on one but not the other does not, in my view, convert the finance charge into a penalty.

Since I am persuaded that the finance charge is not in violation of the statute when it is imposed for ALPA finance-deferred payments, I would not consider ALPA's contention that plaintiffs have failed to exhaust their contractual or statutory remedies before litigating the validity of the charge. I would affirm the judgment of the district court in its entirety.

ORAL OPINION AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA

PROCEEDINGS

THE COURT: I see no reason to delay ruling on the matter. I feel like I know as much about it now as I'll know with further deliberation on it.

The facts are not in dispute, at least in so far as the first claim, first two claims are concerned. Those facts seem to be adequately and properly stated in ALPA's memorandum on pages 1, 2 and those parts of 3 except for the last paragraph, and I adopt the factual statements set forth on pages 1, 2 and page 3 except for the last paragraph, because I think the matter is appropriate for summary judgment or at least partial summary judgment.

The three options which are given to members and nonmembers treat members and nonmembers uniformly. I think that's all that is required, and that is what is meant by uniformity of treatment, and that uniformity of treatment is to me properly imposed upon a nonmember as well as a member -- an obligation to pay the 1.35 percent of his gross pay to the union.

I don't think that uniformity requires that the nonmember higher-paid employee need pay no more than the lowest-paid member of the union. Otherwise, the higher-paid nonunion members are, in fact, getting a free ride. The purpose of the allowance of agency shop in these sort of -- in this industry, was to keep the nonmember from getting a free ride from the efforts of the union and the contributions of its members.

Nor do the other options treat the nonmember nonuniformly. The finance charge is just that. It is applied indiscriminately to the member and nonmember. It is an option which the nonmember as well as the member has. And I think it is perfectly permissible so long as the finance charge is not being asserted against the nonmember in a way that is discriminatory or in a way that is designed, or may have as its effect, coercion to join the union. It is a difference in charge for an employee who desires to make his union payment or his membership

payment or his obligation in a different way than the check-off, or the lump-sum payment at the end of the year. It is not invalid and certainly cannot be claimed as invalid by any assertion made by these plaintiffs.

Nor do I think the collective bargaining agreement is deficient in failing to provide for adequate notification to its members of their rights to dissent or their obligation -- I mean the manner in which they may dissent from the use of their funds for purposes other than collective bargaining. I do not think that there is anything improper in a unitary structure of dues assessments and obligations to pay, regardless of which particular employer is involved. And certainly here -- the first and second claims -- certainly here there is no plaintiff who can claim injury from any duty -- failure of any duty -- of fair representation.

I think, therefore, for these reasons, the defendants are entitled to partial summary judgment on the first and second claims. Insofar as the third claim is concerned, there apparently is a dispute as to the amount to which - the amount of rebate to which each plaintiff may be entitled. I'm not so sure that's a material issue, but it may be. I cannot say from these pleadings that it isn't, although counsel for the plaintiff seems to indicate this is a minor issue and not the purpose of his lawsuit.

But in view of the defendant's - or the defendant ALPA's concession that it is obligated to pay to a dissenting or a dissident nonmember a rebate in the amount of any sums from his payments which were allocated to noncollective bargaining purposes, and perhaps political purposes, I don't think any injunction is necessary. It may well be that a machinery will have to be set up for the determination of such sums where a dissident voices his objection. Certainly, the Court does not want to sit as a Small Claims Court for the adjudication of these rebates. But the case is here on a substantial question, not just on those rebates, and therefore it can remain here for the adjudication of those - of the amounts of those rebates if, after the counsel confer, those rebates are of sufficient size to warrant the obvious expensive talent that's here today.

Further litigation - estimates of the amount of it varies substantially, but even the top limit to 12 plaintiffs probably wouldn't cover the cost of today's counsel fees. Therefore, I would wonder whether, since as far as my ruling is concerned that is the only issue to be determined, whether counsel want to pursue it - that issue - or whether they want to get on to a further review of this on the more important issues. But, insofar as this ruling is concerned - in this court - partial summary justment will be entered in favor of the plaintiff to the extent I've outlined. Leaving, subject to counselor's discussion of this, the issue as to the amount, if any, of any rebate due to these plaintiffs.

Mr. Green, I'll ask you to prepare an order in accordance with these rulings. Present it after submission to counsel for the other side's approval as to form.

I think this renders unnecessary at this time any ruling on motion to compel. I don't know if a motion to compel is necessary for a determination of these rebates. If it is, I will be glad to consider it at a later time.

I think counsel might want to take another look at that motion when they prepare an order on the ruling on the motion for summary judgment.

The motion to consolidate for all purposes is granted.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION

HAROLD E. BAGNALL, et al., Plaintiffs,	)	
v.	)	Civil Action No. 78-128-A
AIR LINE PILOTS ASSOCIATION, INTERNATIONAL, et al., Defendants.	)	
RICHARD L. BERRY, et al., Plaintiffs,	)	
v.	)	Civil Action No. 78-228-A
AIR LINE PILOTS ASSOCIATION, INTERNATIONAL, et al., Defendants.	)	

FINAL ORDER

This cause having come before the Court and the Court having considered the plaintiffs' motion to consolidate; the defendants' motions to dismiss or, in the alternative, for summary judgment in both cases; the plaintiffs' opposition thereto and cross-motion for partial summary judgment in both cases; the memoranda of law and exhibits and affidavits submitted by the parties; the oral argument of counsel for the parties, in open court and at the pretrial conference held in chambers on July 20, 1978; and all of the papers and pleadings on file herein; it is by the Court this 25th day of September, 1978,

ORDERED that plaintiffs' Motion to Amend the Complaint in Civil Action No. 78-128-A be, and the same hereby is, granted, and it is further

ORDERED that Civil Action No. 78-128-A and Civil Action No. 78-228-A be, and they hereby are, consolidated

for all purposes, and it is further

ORDERED that defendants' motions for summary judgment be, and they hereby are, granted:

Claims I and II of both complaints are hereby dismissed in their entirety as to all defendants for failure to state a claim upon which relief can be granted.

Claim III of both complaints, insofar as it seeks relief by virtue of any alleged deficiencies in the terms of the current collective bargaining agreements to which defendants are parties, is also dismissed as to all defendants for failure to state a claim upon which relief can be granted. Claim III also presents a request for monetary relief under Machinists v. Street, 367 U.S. 740 (1961). However, assuming that defendant union makes expenditures which the Street case requires to be rebated in part, this aspect of Claim III is moot as to all defendants since the Union has, after service of the instant complaint, paid or credited to plaintiffs' accounts the amounts specified below, and the plaintiffs do not contest the propriety of those amounts:

Harold E. Bagnall	$3.48	R. D. Longwish	$3.70
Richard L. Berry	2.46	Robert G. Maiers	5.62
Donald Bauer	2.89	Floyd E. Murray	4.29
Kraig A. Hilbink	2.63	William W. Niendorff	4.40
Roy A. C. Hill	5.25	Allan G. Sawatsky	2.46
R. T. Kirchoff	5.22	Clyde B. Smith	3.74
Thomas D. Klemens	3.92	N. J. Vasilaros	3.40
David LeBoutillier	2.59		

And it is further ORDERED that plaintiffs' cross-motions for partial summary judgment in both cases be, and they hereby are, denied in all respect and it is further,

ORDERED that defendant union's motion to compel answers to interrogatories be, and it hereby is, denied as moot.

By the Court:

Alexandria, Virginia

ALBERT V. BRYAN, JR.
UNITED STATES DISTRICT JUDGE

Statutory Provisions

45 U.S.C. §152 provides: General duties - Duty of carriers and employees to settle disputes.

First. It shall be the duty of all carriers, their officers, agents, and employees to exert every reasonable effort to make and maintain agreements concerning rates of pay, rules, and working conditions, and to settle all disputes, whether arising out of the application of such agreements or otherwise, in order to avoid any interruption to commerce or to the operation of any carrier growing out of any dispute between the carrier and the employees thereof.

Consideration of disputes by representatives

Second. All disputes between a carrier or carriers and its or their employees shall be considered, and, if possible, decided, with all expedition, in conference between representatives designated and authorized to so confer, respectively, by the carrier or carriers and by the employees thereof interested in the dispute.

* * *

Organization and collective bargaining; freedom from interference by carrier; assistance in organizing or maintaining organization by carrier forbidden; deduction of dues from wages forbidden.

Fourth. Employees shall have the right to organize and bargain collectively through representatives of their own choosing. The majority of any craft or class of employees shall have the right to determine who shall be the representative of the craft or class for the purposes of this chapter.

* * *

Conference of representatives; time; place; private agreements

Sixth. In case of a dispute between a carrier or carriers and its or their employees, arising out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules or working conditions, it shall be the duty of the designated representative or representatives of such carrier or carriers and of such employees, within ten days after the receipt of notice of a desire on the part of either party to confer in respect to such dispute, to specify a time and place at which such conference shall be held: Provided, (1) That the place so specified shall be situated upon the line of the carrier involved or as otherwise mutually agreed upon; and (2) that the time so specified shall allow the designated conferees reasonable opportunity to reach such place of conference, but shall not exceed twenty days from the receipt of such notice: And provided further, That nothing in this chapter shall be construed to supersede the provisions of any agreement (as to conferences) then in effect between the parties.

* * *

Union security agreements; check-off

Eleventh. Notwithstanding any other provisions of this chapter, or of any other statute or law of the United States, or Territory thereof, or of any State, any carrier or carriers as defined in this chapter and a labor organization or labor organizations duly designated and authorized to represent employees in accordance with the requirements of this chapter shall be permitted -

(a) to make agreements, requiring, as a condition of continued employment, that within sixty days following the beginning of such employment, or the effective date of such agreements, whichever is the later, all employees shall become members of the labor organization representing their craft or class: Provided, That no such agreement shall require such condition of employment with respect to employees to whom membership is not available upon the same terms and conditions as are generally applicable to any other member or with respect to employees to whom membership was denied or terminated for any reason other than the failure of the employee to tender the periodic dues, initiation fees, and assessments (not including fines and penalties) uniformly required as a condition of

acquiring or retaining membership.

(b) to make agreements providing for the deduction by such carrier or carriers from the wages of its or their employees in a craft or class and payment to the labor organization representing the craft or class of such employees, of any periodic dues, initiation fees, and assessments (not including fines and penalties) uniformly required as a condition of acquiring or retaining membership: Provided, That no such agreement shall be effective with respect to any individual employee until he shall have furnished the employer with a written assignment to the labor organization of such membership dues, initiation fees, and assessments, which shall be revocable in writing after the expiration of one year or upon the termination date of the applicable collective agreement, whichever occurs sooner.

45 U.S.C. §153 provides:

First.

* * *

(i) The disputes between an employee or group of employees and a carrier or carriers growing out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions, including cases pending and unadjusted on June 21, 1934, shall be handled in the usual manner up to and including the chief operating officer of the carrier designated to handle such disputes; but, failing to reach an adjustment in this manner, the disputes may be referred by petition of the parties or by either party to the appropriate division of the Adjustment Board with a full statement of the facts and all supporting data bearing upon the disputes.

* * *

(q) If an employee or group of employees, or any carrier, is aggrieved by the failure of any division of the Adjustment Board to make an award in a dispute referred to it, or is aggrieved by any of the terms of an award or by the failure of the division to include certain terms in such award, then such employee or group

of employees or carrier may file in any United States district court in which a petition under paragraph (p) could be filed, a petition for review of the division's order. A copy of the petition shall be forthwith transmitted by the clerk of the court to the Adjustment Board. The Adjustment Board shall file in the court the record of the proceedings on which it based its action. The court shall have jurisdiction to affirm the order of the division or to set it aside, in whole or in part, or it may remand the proceeding to the division for such further action as it may direct. On such review, the findings and order of the division shall be conclusive on the parties, except that the order of the division may be set aside, in whole or in part, or remanded to the division, for failure of the division to comply with the requirements of this chapter, for failure of the order to conform, or confine itself, to matters within the scope of the division's jurisdiction, or for fraud or corruption by a member of the division making the order. The judgment of the court shall be subject to review as provided in sections 1291 and 1254 of Title 28.

* * *

(x) Any division of the Adjustment Board shall have authority, in its discretion, to establish regional adjustment boards to act in its place and stead for such limited period as such division may determine to be necessary. Carrier members of such regional boards shall be designated in keeping with rules devised for this purpose by the carrier members of the Adjustment Board and the labor members shall be designated in keeping with rules devised for this purpose by the labor members of the Adjustment Board. Any such regional board shall, during the time for which it is appointed, have the same authority to conduct hearings, make findings upon disputes and adopt the same procedure as the division of the Adjustment Board appointing it, and its decisions shall be enforceable to the same extent and under the same processes. A neutral person, as referee, shall be appointed for service in connection with any such regional adjustment board in the same circumstances and manner as provided in paragraph (l) of this section, with respect to a division of the Adjustment Board.

System, group, or regional boards; establishment by voluntary agreement; special adjustment boards; establishment, composition, designation or representatives by Mediation Board, neutral member, compensation, quorum, finality and enforcement of awards.

Second. Nothing in this section shall be construed to prevent any individual carrier, system or group of carriers and any class or classes of its or their employees, all acting through their representatives, selected in accordance with the provisions of this chapter, from mutually agreeing to the establishment of system, group, or regional boards of adjustment for the purpose of adjusting and deciding disputes of the character specified in this section. In the event that either party to such a system, group, or regional board of adjustment is dissatisfied with such arrangement, it may upon ninety days' notice to the other party elect to come under the jurisdiction of the Adjustment Board.

If written request is made upon any individual carrier by the representative of any craft or class of employees of such carrier for the establishment of a special board of adjustment to resolve disputes otherwise referrable to the Adjustment Board, or any dispute which has been pending before the Adjustment Board for twelve months from the date the dispute (claim) is received by the Board, or if any carrier makes such a request upon any such representative, the carrier or the representative upon whom such request is made shall join in an agreement establishing such a board within thirty days from the date such request is made. The cases which may be considered by such board shall be defined in the agreement establishing it. Such board shall consist of one person designated by the carrier and one person designated by the representative of the employees. If such carrier or such representative fails to agree upon the establishment of such a board as provided herein, or to exercise its rights to designate a member of the board, the carrier or representative making the request for the establishment of the special board may request the Mediation Board to designate a member of the special board on behalf of the carrier or representative upon whom such request was made. Upon receipt of a request for such designation the Mediation Board shall

promptly make such designation and shall select an individual associated in interest with the carrier or representative he is to represent, who, with the member appointed by the carrier or representative requesting the establishment of the special board, shall constitute the board. Each member of the board shall be compensated by the party he is to represent. The members of the board so designated shall determine all matters not previously agreed upon by the carrier and the representative of the employees with respect to the establishment and jurisdiction of the board. If they are unable to agree such matters shall be determined by a neutral member of the board selected or appointed and compensated in the same manner as is hereinafter provided with respect to situations where the members of the board are unable to agree upon an award. Such neutral member shall cease to be a member of the board when he has determined such matters. If with respect to any dispute or group of disputes the members of the board designated by the carrier and the representative are unable to agree upon an award disposing of the dispute or group of disputes they shall by mutual agreement select a neutral person to be a member of the board for the consideration and disposition of such dispute or group of disputes. In the event the members of the board designated by the parties are unable, within ten days after their failure to agree upon an award, to agree upon the selection of such neutral person, either member of the board may request the Mediation Board to appoint such neutral person and upon receipt of such request the Mediation Board shall promptly make such appointment. The neutral person so selected or appointed shall be compensated and reimbursed for expenses by the Mediation Board. Any two members of the board shall be competent to render an award. Such awards shall be final and binding upon both parties to the dispute and if in favor of the petitioner, shall direct the other party to comply therewith on or before the day named. Compliance with such awards shall be enforceable by proceedings in the United States district courts in the same manner and subject to the same provisions that apply to proceedings for enforcement of compliance with awards of the Adjustment Board.

45 U.S.C. §157 provides: Arbitration - Submission of controversy to arbitration

First. Whenever a controversy shall arise between a carrier or carriers and its or their employees which is not settled either in conference between representatives of the parties or by the appropriate adjustment board or through mediation, in the manner provided in sections 151-156 of this title, such controversy may, by agreement of the parties to such controversy, be submitted to the arbitration of a board of three (or, if the parties to the controversy so stipulate, of six) persons: Provided, however, That the failure or refusal of either party to submit a controversy to arbitration shall not be construed as a violation of any legal obligation imposed upon such party by the terms of this chapter or otherwise.

45 U.S.C. §159 provides:

Award and judgment thereon; effect of chapter on individual employee - Filing of award

First. The award of a board of arbitration, having been acknowledged as herein provided, shall be filed in the clerk's office of the district court designated in the agreement to arbitrate.

Conclusiveness of award; judgment

Second. An award acknowledged and filed as herein provided shall be conclusive on the parties as to the merits and facts of the controversy submitted to arbitration, and unless, within ten days after the filing of the award, a petition to impeach the award, on the grounds hereinafter set forth, shall be filed in the clerk's office of the court in which the award has been filed, the court shall enter judgment on the award, which judgment shall be final and conclusive on the parties.

Impeachment of award; grounds

Third. Such petition for the impeachment of contesting of any award so filed shall be entertained by the court only on one or more of the following grounds:

(a) That the award plainly does not conform to the substantive requirements laid down by this chapter

for such awards, or that the proceedings were not substantially in conformity with this chapter;

(b) That the award does not conform, nor confine itself, to the stipulations of the agreement to arbitrate; or

(c) That a member of the board of arbitration rendering the award was guilty of fraud or corruption; or that a party to the arbitration practiced fraud or corruption which fraud or corruption affected the result of the arbitration: Provided, however, That no court shall entertain any such petition on the ground that an award is invalid for uncertainty; in such case the proper remedy shall be a submission of such award to a reconvened board, or subcommittee thereof, for interpretation, as provided by this chapter: Provided, further, That an award contested as herein provided shall be construed liberally by the court, with a view to favoring its validity, and that no award shall be set aside for trivial irregularity or clerical error, going only to form and not to substance.

45 U.S.C. §181 provides:

> Application of sections 151 and 152 and 154 to 163 carriers by air

All of the provisions of sections 151 to 152 and 154 to 163 of this title are extended to and shall cover every common carrier by air engaged in interstate or foreign commerce, and every carrier by air transporting mail for or under contract with the United States Government, and every air pilot or other person who performs any work as an employee or subordinate official of such carrier or carriers, subject to its or their continuing authority to supervise and direct the manner of rendition of his service.

45 U.S.C. §184 provides:

> System, group, or regional boards of adjustment

The disputes between an employee or group of employees and a carrier or carriers by air growing out of grievances, or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions, including cases pending and unadjusted on April 10, 1936 before the National Labor Relations Board, shall be handled in the usual manner up to and including the chief operating officer of the carrier designated to handle such disputes; but, failing to reach an adjustment in this manner, the disputes may be referred by petition of the parties or by either party to an appropriate adjustment board, as hereinafter provided, with a full statement of the facts and supporting data bearing upon the disputes.

It shall be the duty of every carrier and of its employees, acting through their representatives, selected in accordance with the provisions of sections 181 to 188 of this title, to establish a board of adjustment of jurisdiction not exceeding the jurisdiction which may be lawfully exercised by system, group, or regional boards of adjustment, under the authority of section 153 of this title.

Such boards of adjustment may be established by agreement between employees and carriers either on any individual carrier, or system, or group of carriers by air and any class or classes of its or their employees; or pending the establishment of a permanent National Board of Adjustment as hereinafter provided. Nothing in sections 151 to 163 and 181 to 188 of this title shall prevent said carriers by air, or any class or classes of their employees, both acting through their representatives selected in accordance with provisions of sections 181 to 188 of this title, from mutually agreeing to the establishment of a National Board of Adjustment of temporary duration and of similarly limited jurisdiction.

FILED
JAN 2 1981

No. 80-886

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

AIR LINE PILOTS ASSOCIATION, INTERNATIONAL,
Petitioner,

v.

HAROLD E. BAGNALL, ET AL.,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

RESPONDENT HAROLD E. BAGNALL, ET AL.'S BRIEF IN OPPOSITION

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COUNTERSTATEMENT OF THE ISSUES PRESENTED FOR REVIEW

I. WHETHER THE COURT BELOW WAS CORRECT IN CHARACTERIZING THE PETITIONER'S FINANCE CHARGE AS A PENALTY WHICH IS PROHIBITED BY BOTH SECTION 2, ELEVENTH, OF THE RAILWAY LABOR ACT AND THE COLLECTIVE BARGAINING AGREEMENTS INVOLVED.

II. WHETHER THE COURT BELOW WAS CORRECT IN ENTERTAINING JURISDICTION OF THE CASE.

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OCTOBER TERM, 1980

AIR LINE PILOTS ASSOCIATION, INTERNATIONAL,
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Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

RESPONDENT HAROLD E. BAGNALL, ET AL.'S BRIEF IN OPPOSITION

This brief is being submitted on behalf of the individual Respondents, Harold E. Bagnall, Donald Bauer, Richard L. Berry, Kraig A. Hilbink, Roy A. C. Hill, R. T. Kirchoff, Thomas D. Klemens, David Le Boutillier, R. D. Longwish, Robert G. Maiers, Floyd E. Murray, William W. Niendorff, Allan G. Sawatsky, Clyde B. Smith and N. J. Vasilaros.

As a preliminary matter it should be pointed out that these Respondents have filed their own Petition

For Writ of Certiorari to review the portion of the opinion of the Court of Appeals which was adverse to them. It is No. 80-861 and is currently pending before the Court.

ARGUMENT

THE DECISION BELOW IS IN ACCORD WITH THE APPLICABLE PRECEDENTS OF THIS COURT.

A. The Result Below Does Not Involve A Finding That The Petitioner Breached Its Duty Of Fair Representation.

The Petitioner mischaracterizes the holding below as being one which involves its breach of the duty of fair representation. That simply is not the case. For the convenience of the Court a copy of the complaint in the District Court, No. 78-128-A, is reproduced in the Appendix to this brief. A perusal of the complaint and the opinion of the Court of Appeals will show that the Petitioners are complaining in this Court about the fact that the Second Claim For Relief in the complaint was decided in favor of the Respondents. That claim simply does not involve any allegations of a breach of the duty of fair representation. See Part III of the opinion below where the Court of Appeals stated:

> The union is entitled to its monthly stipend, to be sure, but no more. Nothing in the collective bargaining agreement gives the union the right to regulate a non-member's method of payment. The non-member may not be required by the union to utilize the ALPA finance plan, thus the union may exact no penalty of non-members on this account nor collect a finance charge of them by compulsion. Accordingly, the only obligation of the non-member being to pay, the requirements of 45 U.S.C.

> § 152, Eleventh (a), are met in that the "periodic" monthly payments of a service charge equal to the dues of a member do not include "fines" or "penalties" for the union may not exact a finance charge under the terms of the collective bargaining agreement. (626 F.2d 341)

As is apparent from the above, neither the claim in the complaint nor the Court of Appeals' opinion deciding the claim in favor of the Respondents deal in any way with the Petitioner's duty of fair representation.

Therefore, the Petitioner's statement on page 6 of the Petition that, "The decision below conflicts with this Court's decisions authoritatively defining the *content* of the duty of fair representation," is simply wrong. In addition, the cases cited from *Steele* v. *Louisville & N.R. Co.,* 323 U.S. 192 (1944), to *Vaca* v. *Sipes,* 386 U.S. 171 (1967), and *Motor Coach Employees* v. *Lockridge,* 403 U.S. 274 (1971) are inapposite. The applicable precedent is *Felter* v. *Southern Pacific Co.,* 359 U.S. 326 (1959). In *Felter* this Court held that provisions of a collective bargaining agreement which conflict with the Railway Labor Act support federal question jurisdiction and a declaratory judgment action by an employee seeking to have enforcement of the offending provisions enjoined. *See also, Brotherhood of Railroad Trainmen* v. *Smith,* 251 F.2d 282 (6th Cir. 1968); *Kidder* v. *Eastern Airlines, Inc.,* 469 F.Supp. 1060 (S.D. Fla. 1978).

In Part IV of its opinion the Court of Appeals does refer to cases involving a union's breach of the duty of fair representation but they are cited in support of the proposition that under the Railway Labor Act disputes between an employee and his union representa-

tive are within the jurisdiction of a District Court and are not within the exclusive jurisdiction of the adjustment boards created by the Act. As will be shown below, that proposition is clearly correct and applicable to this case.

In sum, the result below about which the Petitioner complains simply does not involve a finding that the Petitioner breached its duty of fair representation.

B. Under The Circumstances Of This Case, The Respondents Were Not Required To Exhaust Contract Remedies Before Seeking Redress In The District Court.

The short answer to the Petitioner's contention that the individual Respondents have failed to exhaust available contract remedies is that there are no contract remedies to exhaust in this case. That this is so is best demonstrated by *Klemens* v. *Air Line Pilots Ass'n, Int'l,* 484 F.Supp. 186 (W.D. Wash. 1980). Three of the plaintiffs in that case are respondents in this case and the agreement there involved is also the Northwest Airlines agreement involved in this case. While not identical, the essential features of the Braniff Airways and Trans World Airlines agreements have the same effect as the Northwest agreement. While the claim in *Klemens* differs from the claims in this case, it also arose under the union security provision which is involved in this case. In *Klemens* the Petitioner (ALPA or Union in the extract below) also claimed that resort to the contractual grievance-arbitration procedure was required. In denying this claim the court said:

> The Union contends that the plaintiffs' claims are strictly contractual and bound by the grievance-arbitration procedure set forth in section (e) of

the Union Security Agreement. ALPA denies that plaintiffs have a cause of action under the Railway Labor Act which is cognizable by this Court, and it moves to dismiss the Complaint. The union insists that arbitration is compelled both by the Railway Labor Act and by general federal labor policy, as developed by case law. Finally, the defendant argues that no rights arise under the federal statute unless plaintiffs have first been discharged. As an alternative to an Order of Dismissal, ALPA seeks summary judgment in its favor.

After reviewing the Motion, memoranda, and pleadings filed herein, and being fully advised, the Court rules as follows:

Plaintiffs' claim is within the subject matter jurisdiction of this Court if it arises "under any Act of Congress regulating commerce." 28 U.S.C. § 1337. The Railway Labor Act has been held to qualify as such an "Act" for purposes of federal court jurisdiction. *See, e.g., Felter* v. *Southern Pacific Co.,* 359 U.S. 326, at 329, 79 S. Ct. 847, at 851 (1959). Indeed, Congress intended labor organizations to "be held accountable for violations of section 2 . . . (Eleventh)", *Brady* v. *Trans World Airlines,* 401 F.2d 87, at 102 (3rd Cir. 1968), *cert. denied* 393 U.S. 1048, *rehearing denied* 394 U.S. 955 (1969).

Plaintiffs have stated a cause of action under Section 2, Eleventh, of the Railway Labor Act, 45 U.S.C. § 152, Eleventh. Defendant suggests that this provision merely authorizes a union shop (and by construction, an "agency shop"). However, this reading ignores the proviso to that section which states that such labor agreements shall not require membership (or by construction, the payment of alternative "service charges") from employees whose union membership was

> denied or terminated for any reason other than the failure of the employee to tender the periodic dues, initiation fees, and assessments . . . uniformly required as a condition of acquiring or retaining membership.

The mere fact that section (a) of the Union Security Agreement between Northwest and ALPA incorporates the language of Section 2, Eleventh, does not reduce public rights under the statute to exclusively private contractual rights. *See Brady, supra.* 401 F.2d at 95-96. This Court's jurisdiction over claims arising under federal statutes is not so easily foreclosed.

Moreover, the defendant has cited no specific language in the Railway Labor Act which requires the present dispute to be arbitrated. At 45 U.S.C. §§ 183-184, the Act designates certain disputes "between an employer or [a] group of employees and a carrier or carriers" for mediation or arbitration, but the Act does not require such handling of disputes between employees and their bargaining representatives. In fact, the defendant conceded that the present claim is not within the jurisdiction of the System Board of Adjustment (in oral agument before this Court, October 12. 1979). *See also Brady, supra,* 401 F.2d at 92. It follows that

> Since the controversy arises under the laws of the United States, 45 U.S.C., Section 151 et seq., . . . the case is within the jurisdiction of the District Court, 28 U.S.C., Sections 1332 and 1337, unless under the Railway Labor Act jurisdiction is vested in one of the administrative boards. *Brotherhood of Railroad Trainmen* v. *Smith,* 251 F.2d 282, at 285 (6th Cir. 1958).

The defendant union contends that broad federal policy favors the arbitration of this labor dispute, but its authority for this contention is in-

apposite. ALPA cites cases arising in the collective bargaining context, i.e. between labor and management. There, arbitration is favored as a "substitute for industrial strife", *United Steelworkers* v. *Warrior and Gulf Navigation Co.*, 363 U.S. 574, at 578, 80 S. Ct. 1347, at 1350 (1960), or as a *quid pro quo* for a union's agreement not to strike, *Boys Markets, Inc.* v. *Retail Clerk's Union, Local 770,* 398 U.S. 235, at 248, 90 S. Ct. 1583, at 1591 (1970). Those rationales for arbitration do not apply in the present suit by employees against their bargaining representative.

Moreover, this case is distinguishable from those cited by the defendant in which federal courts required employees to pursue intraunion remedies before going to court. *See Buzzard* v. *Local Lodge 1040 of the International Association of Machinists and Aerospace Workers,* 480 F.2d 35 (9th Cir. 1973); *Frederickson* v. *System Federation No. 114,* 436 F.2d 764 (9th Cir. 1970). Here, by contrast, there is no allegation of unexhausted remedies available under ALPA's Constitution or bylaws. Rather, the question is whether the grievance procedure outlined in section (e) of the Union Security Agreement is binding upon plaintiffs in the claim at bar.

On these facts, section (e) of the Union Security Agreement is not applicable. By its express terms, it applies only to

> A grievance by an employee who is to be discharged as the result of an interpretation or application of the provisions of this Union Security Agreement. . . .

The Plaintiffs correctly point out that

> since the Plaintiffs are currently paying the required service fees, there is nothing to trigger the sequence of events leading up to the contractual arbitration proceeding.

> Plaintiffs' Memorandum, filed September 14, 1979, at pp. 5-6. The defendant concedes that there is no allegation that ALPA has a pending request for Northwest to discharge the plaintiffs. Therefore, this Court need not now decide whether section (e) would bind the plaintiffs in the event of their discharge. It is enough to decide that where, as here, the employees have neither been discharged nor face imminent discharge, the grievance procedure under section (e) is inapplicable.
>
> In addition, there is no merit to defendant's suggestion that plaintiffs have no justifiable claim until they are discharged. Their payment under protest of union service charges, if wrongfully required of them, gives rise to actionable damages under the proviso to 45 U.S.C. § 152, Eleventh.
>
> Because neither the Railway Labor Act nor the Union Security Agreement requires the arbitration of plaintiffs' dispute, they may invoke the jurisdiction of this Court to pursue their statutory claims under 28 U.S.C. § 1337. The defendant's Motion to Dismiss is accordingly DENIED. (484 F.Supp. 188-89)

What the court said in *Klemens* about the Northwest contract is equally applicable to the Braniff and TWA contracts.

If the dissimulation in the Petitioner's argument is stripped away, its argument is that the only way employees can contest the validity of the fees demanded under the union security agreements here involved is to refuse to pay the fees; be discharged (even though execution of the discharge may be postponed) and then request arbitration under the contract. That is not, and should not be, the law because it requires the employee to risk his job in order to get a determination of his legal rights. Under the agreements, if an employee

loses the arbitration, his discharge is executed. If that route is followed, the question before the arbitrator is whether the fees have been paid and that simply is not related to the legal questions raised in this lawsuit. Here, the questions raised are questions of law which pertain to the amount of fees which can be lawfully demanded of the respondents under the Act. Questions of law are for the courts, not arbitrators, to decide. *Alexander* v. *Gardner-Denver Company,* 415 U.S. 36 (1974).

It is one thing to require a discharged employee to resort to contractual remedies before seeking legal relief. It is quite another thing to require a working employee to be discharged in order to obtain a legal ruling on the validity of his union representative's actions toward him. In other words, the record in this case does not show the presence of the essential prerequisites—refusal to pay the fees and discharge—for the contractual arbitration process. Clearly, in the absence of these prerequisites there is nothing to arbitrate. *Klemens* v. *Air Line Pilots Ass'n, Int'l, supra.*

The dispute in this case arises under the Railway Labor Act and is between employees and their union representative. The courts have jurisdiction of such disputes. *Czorsek* v. *O'Mara,* 397 U.S. 25 (1970); *Conley* v. *Gibson,* 355 U.S. 41 (1957); *Steele* v. *Louisville & N.R. Co., supra; Richins* v. *Southern Pacific Co.,* 620 F.2d 761 (10th Cir. 1980); *Brady* v. *Trans World Airlines,* 401 F.2d 87 (3d Cir. 1968); *Rumbaugh* v. *Winifrede Railroad Co.,* 331 F.2d 530 (4th Cir. 1964); *Brotherhood of Railroad Trainmen* v. *Smith, supra; Klemens* v. *Air Line Pilots Ass'n, Int'l, supra.* And, despite the Petitioner's assertion to the contrary in note 9, page 12, of the petition, the result below is

not inconsistent with either *Richins* v. *Southern Pacific Company, supra,* or *Goclowski* v. *Penn Central Transp. Co.,* 571 F.2d 747 (3d Cir. 1977).

CONCLUSION

The decision below was correctly decided in accordance with the decisions of this Court. Therefore, there is no reason to grant the Petition and it should be denied.

Respectfully submitted,

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APPENDIX

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION

FILED FEB. 27, 1978
CLERK, U.S. DISTRICT COURT
ALEXANDRIA, VIRGINIA

Civil Action No.: 78-128-A

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WILLIAM W. NIENDORFF
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N. J. VASILAROS
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Plaintiffs,

v.

AIR LINE PILOTS ASSOCIATION, INT'L
1625 Massachusetts Avenue, N.W.
Washington, D.C. 20036

TRANS WORLD AIRLINES, INC.
605 Third Avenue, New York, New York 10016

NORTHWEST AIRLINES, INC.
Minneapolis-St. Paul Int'l Airport
St. Paul, Minnesota 55111
Defendants.

COMPLAINT

(For declaratory judgment, injunction, compensatory and punitive damages, and attorneys' fees.)

JURISDICTION

(1) This Court has jurisdiction over the claims for relief herein stated by virtue of 28 U.S.C. § 1337 in that such claims arise under an Act of Congress regulating commerce, to wit: the Railway Labor Act, 45 U.S.C. § 151, *et seq.*

(2) This is an action for monetary damages and injunctive relief to enforce Plaintiffs' rights under Section 2, Eleventh, of the Railway Labor Act, 45 U.S.C. § 152, Eleventh, and certain collective bargaining agreements, and for a declaratory judgment pursuant to 28 U.S.C. § 2201, for the purpose of determining a question of actual controversy between the parties, as hereinafter more fully appears.

PARTIES

(3) Plaintiffs are citizens of the United States and residents of the states indicated in the heading. Plaintiffs Bagnall, Bauer, Hilbink, Kirchoff, LeBoutillier, Longwish, Murray and Vasilaros are employees of Trans World Airlines, Inc. (TWA). Plaintiffs Hill, Klemens, Maiers and Niendorff are employees of Northwest Airlines, Inc. (Northwest). At all relevant times, Plaintiffs have been subject to collective bargaining arrangements between their employers and the Air Line Pilots Association, International, (ALPA), a labor organization, and have not been members of ALPA or any other labor organization.

(4) TWA and Northwest are operating in interstate commerce. TWA is a body corporate, organized under the laws of the State of Delaware with its principal office at 605 Third Avenue, New York, New York, and Northwest is a body corporate, organized under the laws of the State of Minnesota with its principal office at the Minneapolis-St. Paul International Airport, St. Paul, Minnesota. In their relations with their employees, both are governed by the Railway Labor Act, 45 U.S.C. § 151, *et seq.*

(5) Defendant ALPA is a labor union and is an unincorporated association with its principal office at 1625 Massachusetts Avenue, N.W., Washington, D.C. At all relevant times, ALPA has been the representative of the Plaintiffs as that term is defined in Section 1, Sixth, of the Railway Labor Act, 45 U.S.C. § 151, Sixth.

(6) ALPA, TWA and Northwest are doing business within this District and are subject to being sued here pursuant to the provisions of 28 U.S.C. § 1391, Rule 4, of the Federal Rules of Civil Procedure and Code of Virginia, Annotated §§ 8.01-301 and 305.

FACTS

(7) Under color of 45 U.S.C. § 152, Third, Fourth, and Ninth, ALPA, at all relevant times, has been recognized by TWA and Northwest as the exclusive representative of all employees in bargaining units which include the Plaintiffs. As such, ALPA owes each Plaintiff the duty of fair representation; that is, to represent them without being arbitrary or discriminatory or acting in bad faith.

(8) ALPA has negotiated successive written collective bargaining agreements with TWA and Northwest which have purported and do now claim to govern the terms and conditions of Plaintiffs' wages, hours, and working conditions. Since October 3, 1972 an "Agency Shop" agreement, a true and accurate copy of which is annexed hereto as Exhibit A, has been in effect between Northwest and ALPA. A similar "Agency Shop" agreement, a true and accurate copy of which is annexed hereto as Exhibit B, has been in effect between TWA and ALPA since January 1, 1976. Pursuant to the "Agency Shop" provisions of these agreements, Plaintiffs are, and at all relevant times have been, required to pay to ALPA a service charge equivalent to the dues required of ALPA's members. The dollar amount of the service charge each Plaintiff is obliged to pay to ALPA is determined by multiplying his gross pay times a percentage figure, currently 1.35 percent, unilaterally determined by ALPA.

(9) The wages of the members of the bargaining units to which Plaintiffs belong are such that the difference between the lowest and highest dues or fees paid by members of the unit currently is approximately $850.00 per year. At all relevant times, there have been ALPA members in the bargaining units to which Plaintiffs belong who are obligated to and do pay the lowest dues.

(10) At all relevant times, the service fees paid to ALPA by the Plaintiffs have exceeded the lowest regular dues paid to ALPA by members of the respective bargaining units who are both full-time employees and members of ALPA.

(11) Plaintiffs have been told by authorized representatives of TWA, Northwest and ALPA that, in accordance with the terms of the respective agreements, should they fail to pay the service charges in full, ALPA would request, and TWA and Northwest would grant, their termination.

(12) Plaintiffs have in the past notified, and again by this Complaint do hereby notify, TWA, Northwest and ALPA that they object to the use of their service charges for any purposes other than to defray ALPA's costs of collective bargaining, contract administration, and grievance processing of their respective units.

(13) At all relevant times, monies coerced from Plaintiffs through service charges have been co-mingled with dues collected from ALPA members and, in part, have been expended for purposes other than negotiating and administering collective bargaining agreements covering Plaintiffs' bargaining units and adjusting and settling disputes on behalf of the members of such units.

FIRST CLAIM FOR RELIEF

(14) Plaintiffs reallege and incorporate by reference paragraphs 1 through 13 above.

(15) The collection of service charges from Plaintiffs pursuant to the "Agency Shop" provisions is violative of Section 2, Eleventh, of the Railway Labor Act in that:

1) imposing upon and collecting from nonmembers of ALPA service charges calculated as a percentage of salary

is *per se* violative of Section 2, Eleventh, because such charges are not uniform; and

2) requiring Plaintiffs, notwithstanding their protests, to pay service charges that exceed the dues required of any member of ALPA in the bargaining unit burdens them with a disproportionate share of the costs of collective bargaining.

SECOND CLAIM FOR RELIEF

(16) Plaintiffs reallege and incorporate by reference paragraphs 1 through 13 above.

(17) Notwithstanding the terms of the "Agency Shop" provisions of these contracts which required payment of service charges monthly, during the relevant period ALPA has encouraged nonmembers to pay estimated yearly service charges in advance. ALPA has imposed a penalty, currently calculated at an annual rate of 18% of the unpaid balance, upon nonmembers, including some of the Plaintiffs, who chose not to pay their estimated annual service charges by the end of January of the year in which the service charges are due.

(18) Collection by ALPA of interest on the unpaid balance of the estimated yearly service charge is a violation of Section 2, Eleventh, of the Railway Labor Act, 45 U.S.C. § 152, Eleventh, and a violation of the respective contracts between ALPA and Plaintiffs' employers. Section 2, Eleventh, of the Railway Labor Act does not authorize collection of monies in excess of those required by the agreement.

THIRD CLAIM FOR RELIEF

(19) Plaintiffs reallege and incorporate by reference paragraphs 1 through 13 above.

(20) As Plaintiffs' exclusive bargaining representative, defendant ALPA is subject to a duty to use reasonable efforts to give the Plaintiffs information which is relevant to affairs entrusted to it, including conditions of employment imposing upon Plaintiffs a financial obligation to defendant ALPA, and which, as ALPA has notice, the Plaintiffs would desire to have.

(21) At all relevant times, defendant ALPA has known, or has had reason to know, that Plaintiffs and other members of Plaintiffs' bargaining units have not desired to be affiliated with defendant ALPA, and that Plaintiffs and other members of Plaintiffs' bargaining units object to some or all of the activities undertaken by ALPA and supported, in part, by service charges levied upon non-members. Defendant ALPA has also known, or had reason to know, that Plaintiffs and other members of Plaintiffs' bargaining units would desire to be fully and fairly apprised of the nature and extent of the financial obligations to ALPA that may lawfully be required of them. Despite this notice, and in breach of its duty of fair representation, ALPA has negotiated, enforced, and threatened to enforce "Agency Shop" agreements with TWA and Northwest that do not fairly inform employees that:

1) their financial obligations to ALPA lawfully may be limited to the payment of a *pro rata* share of the costs of negotiating and administering collective bargaining agreements with their employer and adjusting and settling disputes on behalf of the members of their bargaining units; and

2) they may not be required to contribute a sum greater than the lowest contribution made by any member of ALPA.

(22) By agreeing to and cooperating in the enforcement of the "Agency Shop" provisions, TWA and Northwest

have violated the provisions of Section 2, Fourth, of the Railway Labor Act, 45 U.S.C. § 152, Fourth, by unlawfully assisting a representative of their employees.

REMEDY

WHEREFORE, Plaintiffs pray that this Court issue a judgment as follows:

UNDER THE FIRST CLAIM FOR RELIEF

1) Declaring that ALPA may not lawfully collect from Plaintiffs service charges in excess of the minimum dues paid by an ALPA member in the respective units; and

2) Permanently enjoining ALPA from collecting from Plaintiffs service charges in excess of the minimum dues paid by an ALPA member in their respective units; and

3) Awarding Plaintiffs money damages in the amount of the funds unlawfully exacted from them; and

4) Awarding Plaintiffs' counsel attorneys' fees in such amount as may be determined to be appropriate by the Court; and

5) Awarding Plaintiffs such other and further relief as the Court deems just and proper.

UNDER THE SECOND CLAIM FOR RELIEF

1) Declaring that the agreements between ALPA and TWA and Northwest do not authorize collection of any interest on the unpaid balance of the estimated yearly service charge; and

2) Permanently enjoining ALPA from imposing any penalty upon Plaintiffs who do not choose to pay their service charges in advance; and

3) Awarding Plaintiffs money damages in the amount of the penalties unlawfully exacted from them; and

4) Awarding Plaintiffs' counsel attorneys' fees in such amount as may be determined to be appropriate by the Court; and

5) Awarding Plaintiffs such other and further relief as the Court deems just and proper.

UNDER THE THIRD CLAIM FOR RELIEF

1) Declaring that the failure of the defendants to include proper terms in their respective agreements is a breach of the duty of fair representation owed by ALPA to Plaintiffs and is unlawful assistance by TWA and Northwest to a representative of their employees in violation of 45 U.S.C. § 152, Fourth; and

2) Permanently enjoining ALPA, TWA and Northwest from negotiating, enforcing, or threatening to enforce any "Agency Shop" provision in any collective bargaining agreement between ALPA and TWA and Northwest that does not fairly and fully advise nonmembers of their right to limit their financial obligation to ALPA to a *pro rata* share of the costs of negotiating and administering collective bargaining agreements with their employer, and adjusting and settling disputes on behalf of employees in their bargaining units, which share shall not exceed the least share of such costs paid by any full member of ALPA; and

3) Awarding Plaintiffs' counsel attorneys' fees in such amount as may be determined to be appropriate by the Court; and

4) Awarding Plaintiffs such other and further relief as the Court deems just and proper.

/s/ David T. Bryant
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